

ORIGINAL

DOCKET FILE COPY ORIGINAL

Before the
Federal Communications Commission
Washington, D.C. 20554

RECEIVED

DEC 10 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the matter of)
)
Application of BellSouth Corporation,) CC Docket No. 97-208
BellSouth Telecommunications, Inc., and)
BellSouth Long Distance, Inc., for)
Provision of In-Region, InterLATA)
Services in South Carolina)

To: The Commission

OPPOSITION OF VANGUARD CELLULAR SYSTEMS, INC. TO MOTION TO STRIKE

Vanguard Cellular Systems, Inc. ("Vanguard"), by its attorneys, hereby submits this, its opposition to BellSouth's Motion to Strike Portions of Reply Comments Raising New Arguments and/or Including New Evidence (the "Motion").^{1/} As shown below, there is no basis for the Motion, as would have been evident to BellSouth if it had reviewed the initial comments in this proceeding with any care. Indeed, the Motion is an obvious effort to create a spurious procedural issue that could save BellSouth's fatally flawed application. Consequently, the Motion must be denied.

The premise of the Motion is that the entire discussion of reciprocal compensation issues in Vanguard's reply comments should be struck because a single footnote "for the first

^{1/} This opposition responds only to arguments made by BellSouth regarding Vanguard's reply comments in this proceeding. While, as described below, there are significant reasons to reject the Motion entirely, Vanguard does not address the particular circumstances of the other reply comments that also are subject to the Motion. Vanguard is filing this opposition five days prior to the normal deadline for responses under the Commission's Rules in deference to the short deadlines facing the Commission in this proceeding. See 47 C.F.R. § 1.45(a).

No. of Copies rec'd
List ABCDE

OH

time references a May 1997 decision of the California Public Utilities Commission[.]”^{2/}

BellSouth argues that it “has no opportunity to address” this decision and, consequently, that Vanguard’s reference to it is improper.^{3/}

The most obvious problem with this argument is that, in fact, *BellSouth did have a chance to respond to the case cited by Vanguard*. This case was cited in the initial comments of the Paging and Narrowband PSC Alliance of the Personal Communications Industry Association (“PNPA”) for the same proposition it supported in the Vanguard reply comments — that incumbent LECs must provide compensation for all traffic terminated by other telecommunications service providers.^{4/} If BellSouth had wanted to respond to this argument and, indeed, if it had any good response to the proposition that it should not discriminate against CMRS providers, it had ample opportunity to do so in its own reply comments.^{5/} Moreover, given how Vanguard used this case, even a modicum of diligence would have revealed that it had been cited by another party, avoiding the needless expenditure of resources by both the Commission and Vanguard.

At the same time, the underlying premise of BellSouth’s claim in the Motion also is wrong. Vanguard’s argument plainly was responsive to the arguments made by other parties in this proceeding, notably PCIA, that BellSouth is improperly discriminating against certain

^{2/} Motion at 4.

^{3/} *Id.* at 5.

^{4/} See Comments of PNPA at 5-6.

^{5/} In fact, BellSouth devoted about one page of its reply comments to the PNPA discussion of reciprocal compensation, but did not respond to PNPA's citation of the California case. Reply Comments of BellSouth at 81-2.

CMRS providers. Reply comments, after all, are not limited to discussions of points of disagreement with other parties, but also may amplify the points with which the commenter agrees. There is nothing in either the *Michigan Order* or the *Revised Procedures* that changes that basic principle. Consequently, if Vanguard had cited a “new” case in the process of responding to the arguments of PCIA and others, there would be no basis for striking that reference.^{6/} Rather, the public interest requires the Commission to take advantage of the broadest range of information and argument to assist in making a decision on BellSouth’s application.

Even if there were a basis for striking the reference to the California case, the Motion also would have to be denied as overbroad. BellSouth actually asks the Commission to strike Vanguard’s entire discussion of reciprocal compensation on the basis of a single citation.^{7/} While BellSouth may believe it is appropriate to use a blunderbuss to kill a flea, the Motion provides no basis for striking portions of a pleading that do not include or even refer to the supposed offending reference.

This analysis suggests that BellSouth’s motivation for the Motion is not to ensure procedural fairness in this proceeding, but to avoid it. Other evidence supports this

^{6/} BellSouth seems unaware of this consideration when it argues that a series of “new arguments” should be stricken. It offers no evidence, however, that these arguments are not responsive to arguments made in other parties’ comments, except to say that some reply commenters do not cite specific comments to which they are replying. See Motion at 6-8. There is, of course, no requirement in the Commission’s Rules that a party cite the comments to which it is responding.

^{7/} Compare Motion at 6 (requesting that the Commission strike “Pages 6 through 7” of Vanguard’s reply comments) with Reply Comments of Vanguard at 6-7 (discussion of reciprocal compensation issues).

conclusion as well. For instance, BellSouth took nearly three weeks after the deadline for filing reply comments to file the Motion, yet provides no explanation for waiting so long. It appears most likely that the delay was intended to increase the pressure on the Commission and, thereby to increase the likelihood of a procedural error.

For that matter, it is unlikely that BellSouth would suffer any cognizable harm even if all of the allegations regarding the content of parties' reply comments were true.^{8/} Under the procedures for Section 271 applications, BellSouth has the ability to engage in *ex parte* contacts with Commission officials almost up until the time a decision is rendered. Thus, to the extent that there are any truly new arguments in the reply comments, BellSouth has had ample opportunity to respond to them.^{9/}

In this context, the only logical explanation for BellSouth's tactics is that it believes that its application is so flawed that it cannot expect the Commission to grant it. The Motion, consequently, is an effort to create a record for a claim at the Court of Appeals that BellSouth was denied its procedural rights. While, as shown above, there is no basis for

^{8/} This is particularly the case as to the National Cable Television Association's filing, which was made before the deadline for reply comments. Motion at 7. Consequently, BellSouth actually had an opportunity to respond to NCTA in its own reply comments.

^{9/} BellSouth has taken advantage of that opportunity by engaging in a [near-continuous] lobbying campaign. See Public Notice, Ex Parte Presentations and Post-Reply Comment Period Filings in Permit-But-Disclose Proceedings, rel. Nov. 18, 1997, at 2; Public Notice, Ex Parte Presentations and Post-Reply Comment Period Filings in Permit-But-Disclose Proceedings, rel. Nov. 25, 1997, at 4; Public Notice, Ex Parte Presentations and Post-Reply Comment Period Filings in Permit-But-Disclose Proceedings, rel. Nov. 28, 1997 at 4; Public Notice, Ex Parte Presentations and Post-Reply Comment Period Filings in Permit-But-Disclose Proceedings, rel. Dec. 4, 1997 at 5 (listing BellSouth *ex parte* contacts during period from November 12 to 25, 1997).

such a claim, the Commission, when it denies BellSouth's motion, should respond to BellSouth's arguments in detail so as to avoid potential complications when BellSouth appeals the denial of its application. This is the only way to respond to BellSouth's effort to intimidate the Commission and the other parties to this proceeding.

For all these reasons, Vanguard Cellular Systems, Inc. respectfully requests that the Commission deny BellSouth's Motion to Strike Portions of Reply Comments Raising New Arguments and/or Including New Evidence.

Respectfully submitted,

VANGUARD CELLULAR SYSTEMS, INC.

By: 

Raymond G. Bender, Jr.

J.G. Harrington

Cécile G. Neuvens

Its Attorneys

Dow, Lohnes & Albertson, PLLC
1200 New Hampshire Avenue, N.W.
Suite 800
Washington, D.C. 20036

(202) 776-2000

December 10, 1997

CERTIFICATE OF SERVICE

I, Vicki Lynne Lyttle, a secretary at Dow, Lohnes & Albertson, PLLC, do hereby certify that on this 10th day of December, 1997, a copy of the foregoing "Opposition of Vanguard Cellular Systems, Inc. to Motion to Strike" was sent via first-class mail, postage prepaid, to the following:

*Ms. Janice Myles (5 copies)
Policy and Program Planning Division
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W., Room 544
Washington, D.C. 20554

*Donald J. Russell (5 copies)
U.S. Department of Justice
Antitrust Division, City Center Building
1401 H Street, N.W., Suite 8000
Washington, D.C. 20530

*Joel Klein, Esquire
Acting Assistant U.S. Attorney
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

F. David Butler, Esquire
General Counsel
South Carolina Public Service Commission
111 Doctors Circle
P.O. Box 11649
Columbia, SC 29211

*ITS
1231 20th Street, N.W.
Washington, D.C. 20036

Riley M. Murphy, Esquire
Executive Vice President and
General Counsel
American Communications Services, Inc.
131 National Business Parkway, Suite 100
Annapolis Junction, MD 20701

Brad E. Mutschelknaus, Esquire
John J. Heitmann, Esquire
Kelley Drye & Warren LLP
1200 Nineteenth Street, N.W., Suite 500
Washington, D.C. 20036

Rodney L. Joyce, Esquire
Ginsburg, Feldman and Bress
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036

Kelly R. Welsh
John T. Lenahan
Gary L. Phillips
Ameritech
30 South Wacker Drive
Chicago, IL 60606

Theodore A. Livingston, Esquire
Douglas A. Poe, Esquire
John E. Muench, Esquire
Gary Feinerman, Esquire
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, IL 60603

* Indicates hand delivery.

Richard J. Metzger, Esquire
Emily M. Williams, Esquire
Association for Local Telecommunications
Services
888 17th Street, N.W.
Washington, D.C. 20006

Sheldon E. Steinbach, Esquire
Vice President & General Counsel
American Council on Education
One Dupont Circle, N.W.
Washington, D.C. 20036

Christine E. Larger
Director, Public Policy and Management
Programs
National Association of College and
University Business Officers
2501 M Street, N.W.
Washington, D.C. 20037

Mark C. Rosenblum
Leonard J. Cali
Roy E. Hoffinger
Stephen C. Garavito
AT&T Corp.
295 North Maple Avenue
Basking Ridge, NJ 07920

Kenneth P. McNeely
AT&T Corp.
1200 Peachtree Street, N.E.
Promenade I, Room 4036
Atlanta, GA 30309

David W. Carpenter, Esquire
Mark E. Haddad, Esquire
Ronald S. Flagg, Esquire
Lawrence A. Miller, Esquire
George W. Jones, Jr., Esquire
Richard E. Young, Esquire
Sidley & Austin
1722 Eye Street, N.W.
Washington, D.C. 20006

Genevieve Morelli, Esquire
Executive V.P. and General Counsel
The Competitive Telecommunications
Association
1900 M Street, N.W., Suite 800
Washington, D.C. 20036

Danny E. Adams, Esquire
Steven A. Augustino, Esquire
Kelley Drye & Warrent LLP
1200 Nineteenth Street, N.W., Suite 500
Washington, D.C. 20036

James R. Ivan
Manager, Telecommunications
175 Ghent Road
Fairlawn, OH 44333

Antony Richard Petrilla, Esquire
Swidler & Beerlin, Chartered
3000 K Street, N.W., Suite 300
Washington, D.C. 20007-5116

Charles H. Helein
Helein & Associates, P.C.
8180 Greensboro Drive, Suite 700
McLean, VA 22102

Jonathan E. Canis, Esquire
Enrico C. Soriano, Esquire
Kelley Drye & Warrent, LLP
1200 19th Street, N.W., Suite 500
Washington, D.C. 20036

Douglas W. Kinkoph
Director, Regulatory and Legislative Affairs
8180 Greensboro Drive, Suite 800
McLean, VA 22102

James M. Tennant
President
Low Tech Designs, Inc.
1204 Saville Street
Georgetown, SC 29440

Jerome L. Epstein, Esquire
Marc A. Goldman, Esquire
Paul W. Cobb, Jr., Esquire
Thomas D. Amrine, Esquire
Jenner & Block
601 Thirteenth Street, N.W.
12th Floor
Washington, D.C. 20005

Mary L. Brown, Esquire
Keith L. Sear, Esquire
Susan Jin Davis, Esquire
MCI Telecommunications Corporation
1801 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Robert L. Hoggarth
Senior Vice President
Angela E. Giancarlo
Manager, Industry Affairs, CMRS Policy
500 Montgomery Street, Suite 700
Alexandria, VA 22314-1561

Christopher W. Savage, Esquire
Cole, Raywid & Braverman, L.L.P.
1919 Pennsylvania Avenue, N.W.
Suite 200
Washington, D.C. 20006

Philip S. Porter
Nancy Vaughn Coombs
Elliott F. Elam, Jr.
South Carolina Department of Consumer
Affairs
Post Office Box 5757
Columbia, SC 29250-5757

Gary E. Walsh
Deputy Executive Director
South Carolina Public Service Commission
Post Office Drawer 11649
Columbia, SC 29211

Thomas Jones, Esquire
Willkie Farr & Gallagher
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20036-3384

J. Manning Lee, Esquire
Vice President, Regulatory Affairs
Teleport Communications Group Inc.
One Teleport Drive, Suite 300
Staten Island, NY 10311

Michael A. McRae, Esquire
Senior Regulatory Counsel
Teleport Communications Group Inc.
1133 21st Street, N.W., Suite 400
Washington, D.C. 20036

Charles C. Hunter, Esquire
Catherine M. Hannan, Esquire
Hunter Communications Law Group
1620 I Street, N.W., Suite 701
Washington, D.C. 20006

Jordan Clark, President
United Homeowners Association
1511 K Street, N.W., 3rd Floor
Washington, D.C. 20005

Laurie J. Bennett
John L. Taylor
1020 19th Street, N.W., Suite 700
Washington, D.C. 20036

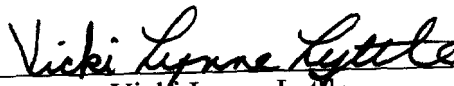
Catherine R. Sloan
Richard L. Fruchterman, III
Richard S. Whitt
Worldcom, Inc.
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036-3902

Andrew D. Lipman, Esquire
Robert V. Zener, Esquire
Swidler & Berlin, Chartered
3000 K Street, N.W., Suite 300
Washington, D.C. 20007-5116

Ronald Binz
Debra Berlyn
John Windhausen
Competition Policy Institute
1156 15th Street, N.W., Suite 310
Washington, D.C. 20005

Daniel L. Brenner
Neal M. Goldberg
David L. Nicoll
1724 Massachusetts Avenue, N.W.
Washington, D.C. 20036

*Michael K. Kellogg, Esquire
Kellogg, Huber, Hansen, Todd &
Evans, P.L.L.C.
1301 K Street, N.W., Suite 1000 West
Washington, D.C. 20005


Vicki Lynne Lytle